

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1199

To be argued by
STUART R. SHAW

B
Pg 5

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee.

VS.

LUIS PEREZ a k/a HEKTOR PEREZ,

Defendant-Appellant.

*From a Judgment of Conviction of the United States District
Court for the Southern District of New York.*

BRIEF FOR APPELLANT

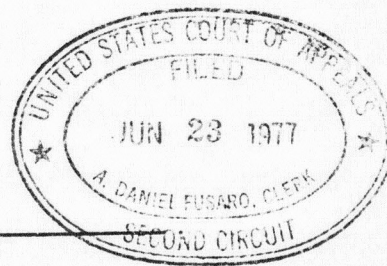
STUART R. SHAW

Attorney for Defendant-Appellant

600 Madison Avenue

New York, New York 10022

(212) 755-5645



10768

LUTZ APPELLATE PRINTERS, INC.

Law and Financial Printing

South River, N.J. New York, N.Y. Philadelphia, Pa. Washington, D.C.
(201)257-6850 (212) 563-2121 (215) 563-5587 (202) 783-7288

TABLE OF CONTENTS

	<u>Page</u>
Table of Cases	i
Preliminary Statement Pursuant to Rule 28(3)	1
STATEMENT OF FACTS	2
a) The Prosecution's Case Against Defendant Perez	2
b) The Defense's Case In Support of Defendant Perez	14
POINT I. THE FAILURE OF THE GOVERNMENT TO PROVE THE REQUISITE ELEMENT OF INTENT CHARGED IN COUNTS TWO, FOUR AND SIX OF THE INDICTMENT REQUIRES A REVERSAL, PURSUANT TO THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.	15
POINT II. THE INSUFFICIENCY OF THE EVIDENCE IN THE TRIAL RECORD ON THE ISSUE OF THE DEFENDANT'S KNOWING ASSISTANCE IN A SCHEME TO DEFRAUD THE GOVERNMENT, COUPLED WITH THE GOVERNMENT'S CONTINUING RELIANCE ON THE AIDING AND ABETTING STATUTE REQUIRES A REVERSAL BY THE APPELLATE COURT.	21
POINT III. THE COURT'S FAILURE TO PROPERLY DELIVER A CLEAR AND PRECISE INSTRUCTION TO THE JURY, COUPLED WITH THE PREJUDICE CREATED BY THE TRIAL JUDGE READING THE FULL INDICTMENT TO THE JURY AT THE ONSET OF TRIAL, REQUIRES A REVERSAL BY THE APPELLATE COURT.	26
POINT IV. THE GOVERNMENT FAILED TO ESTABLISH AN UNLAWFUL AGREEMENT, AN ESSENTIAL ELEMENT IN A CONSPIRACY, REQUIRING A REVERSAL BY THE APPELLATE COURT.	28

TABLE OF CONTENTS
(continued)

	<u>Page</u>
POINT V. THE TRIAL RECORD DID NOT DEMONSTRATE THAT THE DEFENDANT POSSESSED THE REQUISITE ELEMENT OF INTENT REQUIRED TO CONVICT AN INDIVIDUAL IN A CONSPIR- ACY INDICTMENT.	30
CONCLUSION	34

TABLE OF CASES

	<u>Page(s)</u>
<u>Bollenbach v. United States</u> 326 U.S. 607, 612 (1946)	27
<u>Direct Sales v. United States</u> 319 U.S. 703 (1943)	30, 31
<u>Epoch Producing Corporation v. Killiam Shows, Inc.</u> 522 F. 2d. 737 (2nd Cir., 1975)	19, 24
<u>Harris v. United States</u> 404 U.S. 1232 (1971)	18
<u>Ingram v. United States</u> 360 U.S. 672, 678 (1959)	33
<u>J.C.B. Supermarkets, Inc. v. United States</u> 530 F. 2d. 1119 (2nd Cir., 1976)	16
<u>Morrisette v. United States</u> 342 U.S. 246, 271 (1951)	19
<u>Pereira v. United States</u> 347 U.S. 1 (1953)	28
<u>United States v. Agucci</u> 310 F. 2d 817, 828 (2nd Cir., 1962)	28, 30
<u>United States v. Ausmeier</u> 152 F. 2d. 349 (2nd Cir., 1945)	30
<u>United States v. Barber</u> 429 F. 2d. 1394 (3rd Cir., 1970)	22
<u>United States v. Barfield</u> 447 F. 2d. 85 (5th Cir., 1971)	22, 23
<u>United States v. Barry</u> 518 F. 2d. 342 (2nd Cir., 1975)	26
<u>United States v. Gallishaw</u> 428 F. 2d. 760, 763 (2nd Cir., 1970)	22, 23, 32, 33

TABLE OF CASES
(continued)

	<u>Page(s)</u>
<u>United States v. Glantzman</u> 447 F. 2d. 199, 201 (3rd Cir., 1971)	33
<u>United States v. Goyette</u> 458 F. 2d. 992 (9th Cir., 1972)	17
<u>United States v. Hysohion</u> 448 F. 2d. 343, 346 (2nd Cir., 1971)	28, 29, 33
<u>United States v. Joiner</u> 429 F. 2d. 489 (5th Cir., 1970)	23
<u>United States v. McCracken</u> 488 F. 2d. 406 (5th Cir., 1974)	26
<u>United States v. Micciche</u> 525 F. 2d. 544 (8th Cir., 1975)	32
<u>United States v. Newman</u> 490 F. 2d. 139, 142 (3rd Cir., 1974)	22
<u>United States v. Persico</u> 349 F. 2d. 6, 8 (2nd Cir., 1965)	26
<u>United States v. Schwartz</u> 464 F. 2d. 499 (2nd Cir., 1972)	33
<u>United States v. Varelli</u> 407 F. 2d. 735, 749 (7th Cir., 1969)	23
<u>United States v. Wilson</u> 438 F. 2d. 479 (7th Cir., 1971)	15

OTHER AUTHORITIES

<u>Comment, Charles A. Thompson, Reversals for Insufficiency of the Evidence: The Emerging Doctrine of Appellate Acquittal,</u> 8 Ind. L. Rev. 497, 519 (1974)	21
---	----

PRELIMINARY STATEMENT PURSUANT TO RULE 28(3)

Appellant Hector Perez appeals from a judgment of conviction entered on February 8th, 1977 in the United States District Court for the Southern District of New York, before the Honorable Inzer Wyatt, United States District Judge, and a jury.

Indictment No. 76Cr.1045 charged the defendant with conspiracy to defraud the United States and the United States Department of Agriculture, in violation of Title 18, United States Code, Section 371 (Count 1).

Defendant Perez was charged with conspiracy to violate Title 7, United States Code, Section 2023(b), and Title 18, United States Code, Section 2 (Count 2).

Defendant Perez was charged with violations of Title 18, United States Code, Sections 641 and 2 (Count 4).

Defendant Perez was charged with violation of Title 18, United States Code, Sections 287 and 2 (Count 6).

Defendant Perez was further charged with violations of Title 18, United States Code, Sections 1001 and 2 (Count 9).

The trial commenced on January 31st, 1977. On February 8th, 1977, the jury found defendant Perez guilty of Counts 1, 2, 4 and 6.

On March 25th, 1977, Judge Wyatt sentenced Perez to three months on each of Counts 1, 2, 4 and 6, to run concurrently with each other.

STATEMENT OF FACTS

A. THE PROSECUTION'S CASE AGAINST DEFENDANT PEREZ

Subsequent to Judge Inzer Wyatt's reading the indictment to the jury for one hour and forty minutes, Assistant District Attorney Weinberg declared: "You're going to hear about this case and about this conspiracy from Mr. Rosado, who will take the witness stand during this trial" (T-78).

José Rosado, the government's chief ("star") witness, was called to testify about the "alleged" conspiracy (T-135). It was learned that Mr. Rosado had illegally cashed food stamps valued at approximately two-and-a-half million dollars in 1975 and 1976 (T-307). Consequently, Mr. Rosado was facing in excess of a \$20,000 fine, and over 20 to 25 years in jail (T-310). Rosado had been indicted on six counts in the present indictment (App. 3a-23a), but after consummating a deal with the government, he pled guilty to only one count (T-136). In addition, Rosado admitted that he had been convicted of stealing government checks, a felony, in 1973. On cross-examination, Rosado conceded that he had previously "cheated" the United States Government (T-261). However, Rosado explained that he was hopeful that he could obtain a sentence of probation at the conclusion of this trial (T-265, 266, 405).

Modesta Diaz owned four check-cashing establishments, including one at 3796 Broadway, New York, New York. These

"check-cashing establishments are authorized to accept authorization to purchase cards (referred to as "ATP cards") from eligible households with the food stamp coupons referred to on the ATP card." (App. 6a)

Hector Perez worked as a cashier at the check-cashing establishment located at 3796 Broadway, New York, New York. His job was analogous to that of a bank teller. Rosado testified that "in the summer or the fall" of 1975, he met Mr. Diaz for the first time at Mr. Diaz' store at Broadway and 158th Street, and asked Diaz if he could cash ATP cards (T-147). Rosado stated that Diaz would cash each ATP card for \$4.00 (T-147). But during cross-examination, Mr. Rosado explained "at the beginning it was \$4.00, and then I cheat him down to \$3.00 (T-387). Rosado could not recall anyone else being present during this initial conversation (T-147). During cross-examination, Rosado explained that he obtained the ATP cards, which he knew were stolen, from Mr. Collazo, Mr. Rivera, and from drug addicts (T-291). Rosado did not think the defendant knew Mr. Collazo (T-335). Joseph Rivera, another defendant who made a deal with the government, stated that he had never told Hector Perez that the ATP cards were stolen (T-497).

According to Rosado, sometime after his first meeting with Diaz, he went to Mr. Diaz' establishment with several ATP cards, and the defendant was introduced to him by Mr. Diaz (T-151). Rosado stated that Mr. Perez gave him the amount of food stamps that the cards called for, and that Rosado gave Mr. Perez the money which was required -- according to the ATP cards -- to pay for the food stamps (T-154). However, on cross-examination, Rosado stated that he had cashed ATP cards the first time he was in Mr. Diaz' store with Mr. Diaz -- not Mr. Perez (T-352). In addition, when Rosado was asked: "Did you ever pay

my client \$4.00 for an ATP?", first Rosado replied, "Who?" (T-306). Then Rosado stated he never gave Hector Perez money for ATP cards, but only gave Diaz money (T-306-307). Also, when Rosado was asked if anyone else was ever present when he split up the money for the ATP cards with Mr. Diaz, Rosado replied: "Nobody." (T-335). Rosado further stated that he stamped these food coupons in his house, but that he did not believe that Mr. Perez had any knowledge of these facts (T-336).

On cross-examination, Rosado explained that the ATP cards are made out to a particular individual, and that they then had to be endorsed on the back of the card like a check (T-292). Rosado stated he obtained the cards from drug addicts, and that his children and other children in the neighborhood were paid by him to endorse the cards (T-293). Later, on cross-examination, Rosado replied in the negative when asked if he had told Assistant United States Attorney Weinberg about who had endorsed the back of these checks (T-294). However, immediately thereafter, Rosado admitted telling police officer Burke, who was working on this investigation with A.U.S.A. Weinberg about the forged signatures of the minor children (T-294). Rosado was never prosecuted for the aforementioned crimes. In addition, Rosado did not believe that Mr. Perez had ever signed or forged any of the said ATP cards (T-335).

On cross-examination, Joseph Rivera, who made a deal with the government in return for his cooperation, admitted that he had a counterfeit money scheme with Mr. Rosado (T-494). William J. Burke, who was a former police cap-

tain, and who was presently conducting the investigation of the food stamps for the U.S. Department of Agriculture, stated on cross examination that Mr. Rosado mentioned the subject of counterfeit money in regard to Rivera (T-563), but neither of these individuals were prosecuted for counterfeiting.

According to Mr. Rosado, he gave the defendant a "tip" several times when Mr. Perez cashed ATP cards for him. However, Rosado was uncertain if he gave Mr. Perez \$10, \$20, \$30 or \$40, and he could not remember the dates on which he cashed ATP cards at Mr. Diaz' Broadway checking establishment (T-164, 170, 190). On cross-examination, Rosado stated he did not keep records of the ATP cards that he purportedly cashed with Mr. Diaz, or Mr. Perez or Junior, another worker in Diaz' store at 158th Street (T-339, 389).

On cross-examination, Rosado admitted that he engaged in an illegal lottery, called the "numbers," and that he would give Mr. Perez a "tip" when he was in the "chips" (T-352). In fact, a tape recording market "Government Exhibit 6B" demonstrated that Rosado purportedly gave Mr. Perez "tips" when he hit the "numbers" (Reel 654, page 7, T-407, 408).

On cross-examination, Rosado replied in the affirmative when asked if there had come a time when he approached Mr. Perez and tried to persuade him to become involved with a money-order conspiracy (T-330). Rosado then stated that Mr. Perez, the Appellee herein, refused to participate in this scheme (T-330).

According to Rosado, he did not remember cashing in ATP cards at Mr. Diaz' Broadway store with a worker named Junior (T-388). However, as cross-examination continued, Rosado answered in the affirmative when asked if Junior and Mr. Perez would work together to get him coupon books in exchange for the money and the ATP cards which he gave to them (T-390). Junior was not indicted. On cross-examination, Rosado stated that most of the time the Broadway store was very busy, and that there would be people on line who were either cashing checks or purchasing lottery tickets (T-389).

William J. Burke, who was a police captain for 21 years, and who is presently employed with the Office of Investigation, U.S. Department of Agriculture, testified that he was present when Mr. Rosado was arrested on September 9th, 1976 (T-505). Burke stated that he maintained a (memorandum book) running account of his dealings with Rosado in regard to this case, after Rosado was arrested and began cooperating with the government (T-553). Mr. Burke could not recall making any notation in his memorandum book that Mr. Perez had ever received any type of "tip" or "gratuity" from Rosado (T-552). In fact, Rosado admitted on cross-examination that he had told Mr. Burke that Hector Perez was only a "worker" at Mr. Diaz' store (T-329). Also, Rosado replied in the affirmative when asked if he had an agreement with Modesta Diaz and the grocery store owners to defraud the government (T-327).

During cross-examination, Rosado recalled being questioned by Erika Grant, the government agent in charge of the Food Stamp Program in New

York (T-119, 298). Rosado admitted that he had lied to Ms. Grant when she questioned him concerning his purported egg business (T-298). Defense counsel then asked Mr. Rosado if he justified his high redemption of food stamps by telling Ms. Grant that he sold paper bags and Pampers. Rosado replied yes (T-299).

Rosado could not recall a certified mail, return receipt requested letter sent to him on September 12th, 1975 by the government (T-300). Rosado explained that he would have signed for such a letter but he could not remember receiving the one in question (T-300). But he did recall receiving letters every week of every month from the government concerning possible excessive redemptions of food stamp coupons (T-300, 301).

Charles Daniel Allen, who presently works in the Office of Investigation, United States Department of Agriculture (T-584), replied on cross-examination that he had seen the September 12th, 1975 letter which had been sent to Mr. Rosado stating the possible penalties and violations an individual could be subject to if he cashed food stamps illegally (T-598). Mr. Allen was then asked if he had met with Ms. Grant, and whether she had told him that Mr. Rosado had been called in as early as 1975 to be questioned in regard to the irregularities in his food coupon redemptions. Allen answered that "I've observed correspondence that his redemptions were excessive prior" (T-598). When Allen was asked to clarify what he meant by "excessive," he stated: "I know I observed a hundred, two hundred thousand a month or something like that" (T-598, 599). However, Mr. Allen did not know of anyone who had ever gone to the bank or the check cashiers to alert them that Mr. Rosado was cashing excessive amounts of redemptions (T-599).

On cross-examination, government agent Burke, who was keeping Rosado under surveillance from the date he was arrested, replied in the affirmative when asked:

"Do you recall making the notation that an illegal ATP, because it had been expired, was returned to Mr. Rosado by my client, Mr. Perez; do you recall making a notation of that in your notebook?" (T-559)

Also, Burke responded "yes" when asked if he had made a notation in his memorandum book that on September 18th, Mr. Perez had returned to Rosado a check for insufficient funds. Mr. Burke admitted that he did not interview bank tellers who received the said food stamp coupons (T-560). Nor did he alert Mr. Perez to the fact that Rosado was engaging in the same type of illegal activity for which he was convicted of in 1973 (T-260, 560).

Ms. Erika Grant, who was in charge of the Food Stamp Program in New York, indicated on cross-examination that Mr. Rosado had told her his redemptions were high because he sold many eggs (T-719). Ms. Grant did not recall sending Rosado the September 12th, 1975 certified letter, but remembered when her memory was refreshed (T-719). Ms. Grant answered yes when asked if she spoke to Rosado about his high redemption rate in September, and wrote him a letter in 1975, and then again later on in November of 1975 (T-720). However, she could not recall the government's sending Rosado another letter after this date concerning the excessive redemption of two-and-one-half million dollars' worth of coupons (T-720).

Mr. Rosado was arrested on September 9th, 1976. Thereafter, he agreed to wear a Nagra tape recorder when he engaged in conversations with other

individuals (T-135). The government asserted that two conversations which Rosado had with Mr. Perez were critical in regard to the defendant's "willingly" and "knowingly" participating in a scheme. The first one, Government Exhibit 6C, took place on September 20th, 1976, when Mr. Diaz was in the hospital (T-228). Rosado recalled that Mr. Perez phoned him to talk about Mr. Diaz' nose operation (T-228). Rosado stated the cost of the operation was discussed (T-228). On cross-examination, Mr. Rosado admitted that Perez called him because Mr. Diaz was in the hospital, and that it was not usual for Perez to call him (T-334).

On cross-examination, Rosado admitted that he could not identify tapes 1 through 9, which were admitted in evidence, by simply looking at the tapes (T-253). Mr. Rosado explained that was "the reason I put my initials" on the tapes (T-253). When Rosado was asked what date he placed his initials on the tapes which were made in September 1976, he replied that he initialed them for the first time in January 1977 (T-253). During cross-examination, Rosado replied in the negative when he was asked if he knew what had happened to the tapes from September 19th, 1976 until the last week of January 1977 (T-254). In addition, Rosado answered that he did not know whose custody or control the tapes were in during the said five-month period (T-254).

Margarita Mensa, a professional simultaneous translator, testified that she had listened and prepared the government transcripts marked Exhibit 6A (No. 694) and 8A (No. 730) (T-346). On cross-examination, Ms. Mensa stated

that she had made the translations in November 1976, but that she did not know who had control of the tapes prior to November 1976 (T-346, 347), nor did she know what happened to the tapes after November 1976 (T-347).

A.U.S.A. Weinberg stated that Mr. Hoffman, a professional interpreter, had trouble making out the conversation contained in Exhibit 3C (T-240). In fact, Richard Schoen, another professional interpreter, testified that when he listened to the recording marked 3C, all he could make out was static (T-643).

Agent Burke explained during cross-examination that the Nagra tape recorder that Rosado was wearing was not defective (T-554). However, Burke stated that the machine was not working properly on September 21st, the day after the purported conversation concerning Mr. Diaz' operation between Mr. Perez and Mr. Rosado (T-556). It was also not functioning properly on Wednesday, September 22nd, 1976 (T-556). Burke stated that it was not the Nagra unit that was at fault, but it was the way the unit was installed onto the body of Rosado (T-554).

The government called Hubert Erwin as a witness (T-731). Erwin testified that he was an investigator with the New York Police Department, and that he was an expert in operating Nagra recording devices (T-734-740). He stated that in his six years of experience in working with these machines, he could only remember one machine that didn't work properly. He elaborated that,

in that one instance, the individual did not put the tape in the machine correctly (T-734). Erwin stated that there are two buttons on the outside of a Nagra device. One is the start, stop and neutral; the other a battery tester (T-735). Erwin explained that if someone was wearing a Nagra recorder, he could manually turn the device on or off, but if Erwin strapped it on, he would have put a piece of tape over the on-and-off button so it couldn't be deactivated, accidentally or otherwise (T-736). Mr. Erwin did not know if the Nagra device in the present case was strapped on properly or if it was broken (T-736).

The government's other "exhibit" that allegedly linked Mr. Perez to a food stamp conspiracy was a tape recording marked 6B, September 24th, 1976. This critical conversation read like this:

Rosado: What did you say?

Hector: (Unintelligible)

Rosado: What do you have? Only half of it?

Hector: No, I have most of it.

Rosado: Huh?

Hector: I have twenty thousand, thirty thousand dollars.

Rosado: In coupons?

Hector: (Unintelligible...Pause...) 800 per week. I also have it read there.

Rosado: Okay. Are you alone today?

Hector: (Unintelligible)

Defense counsel asked was that the way the conversation went?

Rosado: Yes.

Defense Counsel: "...no, not this one, this one has a prize, this one has dollars, with this one I shall make 5,000 firecrackers! 5,000, 100.

Hector: 7 1.

Rosado: Zer NO.

Defense Counsel: Are you talking there about lottery tickets?

Rosado: Yes.

Defense Counsel: Is this right after what you were just talking about a moment ago?

Rosado: That was in his cashier we were talking.

Defense Counsel: Right, that is the way the conversation went that day, right?

Rosado: Yes!

Defense Counsel: And the firecrackers meant lottery tickets, right?

Rosado: Yes, \$5,000 if he hit the number.

Defense Counsel: You said the firecrackers in Spanish, you were going to get \$5,000 for your lottery ticket and this one was going to win, right?

Rosado: Yes, sir!

(T-406, 407, 408)

On cross-examination, Rosado recalled that there was loud music playing in the Broadway store when tape 6B was made (T-409).

During cross-examination, Rosado admitted that he was always mistaken in remembering names (T-412). He also stated that he was exaggerating in his conversation of September 24th, 1976 (6B), and that when he said he used to bank \$40,000 as a policy-maker, in reality he was broke (T-413).

Joseph Rivera, who was permitted to plead guilty to only Count 1 of the indictment, in return for his cooperation with the government, admitted on cross-examination that he lied to the government after he was arrested (T-460). However, he stated that he decided to tell the truth "about three weeks or a month later, after I was arrested" (T-494). Additionally, Rivera explained that he had a counterfeiting scheme with Mr. Rosado (T-494).

Rivera, who was introduced to Diaz in Rosado's store, had an agreement to sell ATP cards to Diaz. On "some date," he brought ATP cards to Mr. Diaz' 158th Street establishment. Rivera testified on direct examination that the first time he went to Mr. Diaz' store located at 158th Street and Broadway, Mr. Diaz was sitting down on a chair, "and when I rang the bell, Mr. Diaz gave the okay to Hector Perez for him to open up" (T-427). Rivera stated he did not know Mr. Perez prior to this time (T-427). Rivera testified that he gave the ATP cards to Diaz, and that Diaz told him the amount of money that "I had to give him, and Diaz told me about the money that he has to give me in coupons" (T-427).

Rivera stated that "about" four times later, after doing business directly with Mr. Diaz, "the employee, Hector, and another employee were in the 158th Street store alone" (T-433), Rivera asked Mr. Perez to cash ATP cards. Rivera testified that Mr. Perez responded:

"He said to me his boss wasn't there. Modesta wasn't there, that he was in another store. Hector called him on the phone and told him that I was there, and Diaz gave him on the phone the okay for him to cash the cards."

(T-434)

Mr. Rivera replied that he gave the defendant the exact face value for the conversion of the coupons (T-438). He stated that "nothing extra was paid to Hector Perez."

Rivera testified on direct examination that he had told Mr. Torrez, the co-defendant on trial, that the ATP cards were stolen (T-422). However, he never told Mr. Perez that the cards were stolen (T-497).

B. THE DEFENSE'S CASE IN SUPPORT OF DEFENDANT PEREZ

The defense called Santos Lopez Franko, who testified that he owns the house in Brooklyn in which Mr. Perez lives (T-625). Mr. Franko was asked if he knew Mr. Perez' reputation for truth, veracity and honesty in that neighborhood. He stated that "in the year and a half that I know him and that he has been living in my house, I have always found him to be an honest person and a hard-working person" (T-626). Mr. Franko explained that Mr. Perez' mechanic in Brooklyn always stated that Mr. Perez had a good reputation for truth, honesty and veracity (T-627).

The government stipulated that Andres Collazo, José Lobriél, also known as "Chegui, Frank Cuevas, also known as "Frankie," Joseph Comacho and Justa Collazo had each entered a guilty plea in this case, and that none of the aforementioned people knew Hector Perez (T-725).

POINT I. THE FAILURE OF THE GOVERNMENT
TO PROVE THE REQUISITE ELEMENT
OF INTENT CHARGED IN COUNTS TWO,
FOUR AND SIX OF THE INDICTMENT
REQUIRES A REVERSAL, PURSUANT TO
THE DUE PROCESS CLAUSE OF THE
UNITED STATES CONSTITUTION.

Judge Wyatt, the District Court Judge, in his charge to the jury, in effect declared that the jury must decide if the defendants had the requisite intent to become a part of the substantive offense when he charged the jury,

" ...intent in the context of this case involves primarily whether... Perez knew that Rosado and Rivera were not entitled to buy food stamps with the ATP cards they presented." (T-966)

It is respectfully submitted that the government failed to prove, beyond a reasonable doubt, that Perez committed an offense with the requisite element of "knowledge," required by the charge to the jury (T-966), and pursuant to the respective counts in the indictment (App. 3a-23a).

Count 2 of the instant indictment (App. 3a-23a) charges the defendant with "unlawfully, wilfully and knowingly" altering and possessing coupons and ATP cards in a manner not authorized by 7 U.S.C. §2023(b) of the Food Stamp Act of 1964. In United States v. Wilson, 438 F. 2d. 479 (7th Cir., 1971), the appellant was convicted of violating 7 U.S.C. §2023(b), one of the same statutes that the defendant herein was charged with. In Wilson, supra,

the defendant, who owned a grocery store, knowingly and wilfully violated the statute by selling \$1,650 worth of food stamp coupons for \$1,500 to another food retailer. Id. at 480. The case at bar is clearly distinguishable.

Rosado (co-defendant, turned informant) was never given an incorrect amount of food stamps by the appellant, Mr. Perez (T-352). More probative on the issue of whether the defendant "knowingly" and "wilfully" attempted to defraud the government, was the fact that Rosado testified on cross-examination: "Did you ever pay my client \$ 4.00 for an ATP?" Initially, Rosado replied, "Who?" (T-306). Then Rosado testified that he had never given Hector Perez money for ATP cards, but only gave the co-defendant Diaz (who pled guilty) money (T-306, 307).

In J.C.B. Supermarkets, Inc. v. United States, 530 F. 2d. 1119 (2nd Cir., 1976), J.C.B. Supermarkets, Inc. was authorized to participate in the food stamp program (Id. at 1121), just as the check-cashing establishment Perez was employed in was duly registered to sell food stamps. The government brought out at trial that United States Department of Agriculture agents were able to purchase from J.C.B. ineligible items on three different dates. Id. at 1121. Subsequently, "store personnel were given warnings in each case, and J.C.B. was advised in writing of the violations." Id. at 1121. It is relevant to note that the clerks involved in the transactions in that case had not been charged with any offenses. Id. at 1121. In the instant case, one Junior, the other clerk who worked in the 108th Street check-cashing establishment with Mr. Perez, was not prosecuted, either.

In the case at bar, the head of the Federal Food Stamp program in New York, Erika Grant, had personally investigated Rosado during 1975-1976 (T-300, 301, 598, 599). She had written Rosado several letters in an official government capacity concerning Rosado's possible excessive food stamp redemptions (T-719, 720). However, the government did not warn the defendant Perez, an employee, in regard to Rosado's activities, as distinguished from J.C.B. Supermarkets, Inc., supra. In addition, in J.C.B. Supermarkets, Inc., supra, at 1121, knowledge of the owner of the store was not imputed to the respective clerks. In the instant case, Perez, without prior warning or knowledge, was indicted and tried.

In United States v. Goyette, 458 F. 2d. 992 (9th Cir., 1972), the defendant was convicted of violating 7 U.S.C. §2023(b). The elements of "knowingly" and "wilfully" defrauding the government were established at trial when Goyette "admitted his purchase of food stamps was unlawful." Id. at 993. In the present case, the record does not contain an implication that the appellant Perez knowingly and wilfully was defrauding the government. On the contrary, Rosado first testified on direct examination that the defendant allegedly accepted \$20.00 or \$30.00 tips for cashing ATP cards for him. However, Captain Burke, who was employed by the Office of Investigation, United States Department of Agriculture, and who kept a running account of his dealings with Rosado after he was arrested and began to cooperate (T-503), and who interviewed Rosado at length about all his illegal dealings, testified

that he could not recall making any notation in his memorandum book that Mr. Perez had ever received any type of "tip" or "gratuity" from Rosado (T-552). The evidence at trial and the transcript of the tapes made by Rosado in September of 1976 of Perez, without Perez' knowledge or consent, revealed nothing about tips of any kind, and revealed no evidence of Perez benefiting financially or otherwise from Rosado's conspiracy and acts to defraud the government.

The Supreme Court recently reaffirmed that:

" ...it is beyond question of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged...violates due process." Harris v. United States, 404 U.S. 1232 (1971).

It is respectfully submitted that the evidence at trial failed to establish that the defendant possessed the element of intent charged in Count 2 of the indictment, and violated the defendant's Constitutional rights under the Fourteenth Amendment of the Constitution of the United States.

The defendant was convicted in Court 4 of violating 18 U.S.C. §641, which reads (in pertinent part):

" Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money or thing of value in the United States..."

The Supreme Court, commenting in a leading case, interpreting the element of intent required to convict an individual, under 18 U.S.C. §641, enunciated the rule that:

" Knowledge of course is not identical with intent and may not have been the most apt words of limitation. But knowing conversion requires more than knowledge that the defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion...whether the mental element that Congress required to be spoken of as knowledge or as intent, would not seem to alter its bearing on guilt." Morrisette v. United States, 342 U.S. 246, 271 (1951).

In Morrisette, supra, the defendant, a fruit stand operator, realized \$84.00 by "converting" what he thought were abandoned government castings. Id. at 248.

The Second Circuit, in Epoch Producing Corporation v. Killiam Shows, Inc., 522 F. 2d. 737 (2nd Cir., 1975), held that "an inference will be upheld only if application of common experience and logic to the underlying evidence support it." In the case at bar, Rosado realized a gain of approximately two and a half million dollars in 1975 and 1976 (T-307), while Mr. Perez at most allegedly received a few twenty and/or thirty-dollar tips for "numbers" successes of Rosado, which were not gains from the conspiracy charged.

Appellant argues that that failure of the prosecution at trial to produce clear and convincing proof of intent and/or gain realized by Perez in the conspiracy must result in a reversal by this honorable court of the conviction below, pursuant to the Fourteenth Amendment of the Constitution of the United States, and cases cited herein.

POINT II. THE INSUFFICIENCY OF THE EVIDENCE
IN THE TRIAL RECORD ON THE ISSUE OF
THE DEFENDANT'S KNOWING ASSISTANCE
IN A SCHEME TO DEFRAUD THE GOVERN-
MENT, COUPLED WITH THE GOVERNMENT'S
CONTINUING RELIANCE ON THE AIDING
AND ABETTING STATUTE REQUIRES A
REVERSAL BY THE APPELLATE COURT.

The government relied solely on 18 U.S.C. §2 to
convict the defendant under Count 6 of the indictment (T-949). 18 U.S.C. §2
provides that:

" (a) Whoever commits an offense
against the United States, or aids, abets,
counsels, commands, induces or procures
its commission is punishable as a prin-
cipal.

" (b) Whoever wilfully causes an
act to be done, which if directly performed
by him or another, would be an offense
against the United States is punishable as
a principal."

Charles Thompson, in a provocative discussion of
the quantum of evidence required in the record to justify an appellate court
to enter a judgment of acquittal, asserted that:

" When the evidence at trial is
insufficient to prove the commission of
any crime, it is not difficult to conclude
that an appellate court should enter a
judgment of acquittal and order the defen-
dant discharged from further prosecution."
Comment, Charles A. Thompson, Reversals for
Insufficiency of the Evidence: The Emerging
Doctrine of Appellate Acquittal, 8 Ind. L.
Rev. 497, 519 (1974).

In the case at bar, Judge Wyatt stated that Count 6 of the indictment turned on whether or not the government proved that the defendant violated 18 U.S.C. §2 (T-949).

It is respectfully submitted that the evidence on the record was insufficient to convict the defendant of violating 18 U.S.C. §2 charged in Counts 2, 4 and 6 of the indictment.

In United States v. Newman, 490 F. 2d. 139, 142 (3rd Cir., 1974), both the court and the government agreed that 18 U.S.C. §2 has been "construed to require a specific intent to bring about a criminal act." Id. at 142; United States v. Barfield, 447 F. 2d. 85 (5th Cir., 1971); United States v. Barber, 429 F. 2d. 1394 (3rd Cir., 1970).

In the case at bar, the government's most compelling evidence on the defendant's alleged intent to violate 18 U.S.C. §2 in regard to Counts 2, 4 and 6, respectively, of the indictment, was that Rosado's ATP cards were cashed by Mr. Perez, and that he was compensated with "tips" of twenty to thirty dollars. Rosado's lack of credibility was clearly brought out during the trial (T-135, 136, 261, 310, 291, 147, 294, 299, Tape 6B, App. 7a-Perez).

In United States v. Gallishaw, 428 F. 2d. 760, 763 (2nd Cir., 1970), the Second Circuit Panel declared that to convict the defendant for the crime of aiding and abetting a bank robbery, "the government must

show at a minimum that the defendant knew that bank was to be robbed." Id. at 763. In the instant case, Rosado had successfully deceived the trained and informed United States Department of Agriculture agents and bureaucracy for about two years in regard to his illegal venture.

The United States Department of Agriculture personnel had interviewed him on a one-to-one basis, and never discovered that Rosado had hoodwinked them and/or that the government had been expropriated out of hundreds of thousands of dollars in food stamp receipts. The testimony of Rosado bears out Perez' difficulties, as a lay person, to ascertain the fact that a conspiracy existed: "Most of the time the Broadway store was very busy, and that there would be people on line who were either cashing checks or purchasing lottery tickets" (T-389). Further, both Rosado and Rivera testified that they never told Perez that the cards were in fact stolen (T-335, 336, 497).

In United States v. Barfield, 447 F. 2d. 85, 88 (5th Cir., 1971), the court held that, in order to sustain a conviction for aiding and abetting, the government must show that the defendant:

" ...shared criminal intent or purpose of the actual perpetrators of the crime and that he knowingly assisted them in the accomplishment of that purpose." United States v. Barfield, 447 F. 2d. 85, 88 (5th Cir., 1971). See also United States v. Varelli, 407 F. 2d. 735, 749 (7th Cir., 1969); United States v. Joiner, 429 F. 2d. 489 (5th Cir., 1970).

In evaluating this "criminal purpose," Judge Wyatt charged the jury that in regard to aiding and abetting:

"...you may consider whether a defendant had any stake in the venture, since financial interest in the outcome of a crime is sometimes significant as a motive." (T-942)

According to the government, the defendant's motive or stake in this venture was the alleged "tips" from Rosado. However, the trial record discloses that no other individual witnessed these alleged "gratuities" paid by Rosado. In addition, the government's critical tape (App. 7a), which purportedly demonstrated that Mr. Perez received "tips" for his assistance in the said scheme, in actuality established: (1) that the defendant did not have any idea of defrauding the government (T-406); (2) that Mr. Rosado believed that he gave the defendant Perez "tips" when Rosado "hit the numbers" (T-407, 408); and (3) that Mr. Rosado was a policy-maker and that he exaggerated and had an erratic memory, which Rosado admitted to (T-412, 413).

In Epoch Producing Corporation v. Killiam Shows, Inc., 522 F. 2d. 737 (2nd Cir., 1976), the court held that "an inference will be upheld only if application of common experience and logic to the underlying evidence supports it." The trial record in the instant case compels one to the unequivocal conclusion that the appellant did not aid and abet, and offer assistance to others, as Counts 2, 4 and 6 charge (App. 3a-23a-Torrez).

It is respectfully submitted that the government failed to prove that the defendant intended to knowingly assist others in defrauding the government, and therefore his conviction below should be reversed, and a new trial ordered. The trial judge should not have permitted the aforementioned counts to go to the jury under the circumstances described herein.

POINT III.

THE COURT'S FAILURE TO PROPERLY DELIVER A CLEAR AND PRECISE INSTRUCTION TO THE JURY, COUPLED WITH THE PREJUDICE CREATED BY THE TRIAL JUDGE READING THE FULL INDICTMENT TO THE JURY AT THE ONSET OF THE TRIAL, REQUIRES A REVERSAL BY THE APPELLATE COURT.

" The purpose of a charge is adequately, yet succinctly, to instruct the jury as to its function, which is the independent determination of the facts, and the application of the law, as charged by the court, to the facts, as found by the jury." United States v. Persico, 349 F. 2d. 6, 8 (2nd Cir., 1965) (Conviction reversed because of improper charge to the jury); see also United States v. Barry, 518 F. 2d. 342 (2nd Cir., 1975) (Conviction reversed because of improper charge to the jury); United States v. McCracken, 488 F. 2d. 406 (5th Cir., 1974) (Conviction reversed because of improper charge).

In the present case, Counts 2, 4 and 6 of the indictment required the government to prove the elements of "knowingly" and "wilfully" beyond a reasonable doubt (App. 3a-23a). The judge defined these critical elements only one time during his entire charge to the jury (T-933). In regard to Counts 4 and 6 (App. 3a), the judge summarily explained to the jury that "I earlier defined those terms for you" (T-952, T-940).

The Supreme Court commented on the role of the trial judge concerning his instructions to the jury when it stated that:

" Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." Bollenbach v. United States, 326 U.S. 607, 612 (1946).

In the case at bar, Judge Wyatt's charge in respect to Count 6 of the indictment (App.3a-23a) declared that the government:

" ...relies on the aiding and abetting statute which I read and explained earlier and will not repeat."

(T-949)

This casual attitude by Judge Wyatt with regard to the crucial aiding and abetting statute which the government placed such great reliance on did not adequately alert and/or inform the jury of the elements of aiding and abetting.

The confusion and prejudice in the minds of the jurors was exacerbated by the judge reading the jury the entire indictment for one-and-a-half hours at the beginning of the trial. It should be noted that the judge charged solely on Counts 1, 2, 4 and 6 (T-22). In addition, before Judge Wyatt read the indictment, he informed the jury that the indictment contained twelve defendants (T-22).

It is respectfully submitted that all of the above-mentioned factors resulted in severe prejudice to Mr. Perez. The law in this circuit is clear that an improper charge must lead to a reversal under the circumstances presented herein.

POINT IV.

THE GOVERNMENT FAILED TO
ESTABLISH AN UNLAWFUL
AGREEMENT, AN ESSENTIAL
ELEMENT IN A CONSPIRACY,
REQUIRING A REVERSAL BY
THE APPELLATE COURT.

The government's evidence in the record, which supposedly proved the existence of an unlawful agreement, an essential element in a criminal conspiracy, consisted principally of a tape recording of a conversation between the defendant and Rosado (App. 7a-Perez); and the testimony of Rosado that Mr. Perez accepted "tips" from him while working in the check-cashing establishment located at 108th Street and Broadway (T-164, T-352).

Defendant Perez argues that there was no evidence in the record as to a crucial element of the offense charged.

In Pereira v. United States, 347 U.S. 1 (1953), the court stated that a conviction for conspiracy cannot be sustained unless there is proof of an "agreement to commit an offense..." Id. at 12; United States v. Agucci, 310 F. 2d. 817, 828 (2nd Cir., 1962). In the instant case, there was no evidence that indicated that Mr. Perez had entered into an unlawful agreement. In fact, the government stipulated that the defendant did not know five of the individuals named in the indictment (T-725).

In United States v. Hysohion, 448 F. 2d 343, 346 (2nd Cir., 1971), the Second Circuit Panel reversed the conspiracy conviction of the defendant Rimbaud under 21 U.S.C.A. 173. The court declared that:

" ...we find no evidence in the record and nothing in the findings below which would support the existence of an unlawful agreement. The fact that Rimbaud told Everett, a willing buyer, how to make contact with a willing seller does not necessarily imply that there was an agreement..." Id. at 347.

In the present case, Rosado, on cross-examination, admitted that he had attempted to persuade the defendant Perez to become involved with a money order conspiracy (T-330). However, Rosado explained that Mr. Perez refused to participate in this scheme (T-330), while the co-defendant at trial did accept the proposition, and did commit said crime. Another fact that demonstrates that the inference of an unlawful agreement was not existent, as the government charged (App.3a-23a), is that despite the fact that both Rosado and Rivera cooperated with the government in return for reduced pleas (T-104), and a promise that their cooperation would be made known to the sentence judge at sentencing, that neither offered testimony at trial which would have supported the inference of an unlawful agreement. Rosado stated that Mr. Perez accepted "tips" from him, but during the trial he admitted that he "tipped" Mr. Perez when he, Rosado, "hit the numbers" (T-407).

It is respectfully submitted that the government failed to establish the existence of an unlawful agreement between the defendant and another co-conspirator.

POINT V.

THE TRIAL RECORD DID NOT
DEMONSTRATE THAT THE
DEFENDANT POSSESSED THE
REQUISITE ELEMENT OF INTENT
REQUIRED TO CONVICT AN
INDIVIDUAL IN A CONSPIRACY
INDICTMENT.

Count 1 of the indictment charged the defendant with conspiring to defraud the United States and the United States Department of Agriculture (App.3a-23a). The government was required to prove that the defendant had the required intent to enter an unlawful agreement, which is a necessary element in a conspiracy. United States v. Ausmeier, 152 F. 2d. 349 (2nd Cir., 1945); United States v. Agucci, 310 F. 2d. 817 (2nd Cir., 1962). The government attempted to demonstrate that the defendant had said requisite intent by putting in evidence that Mr. Perez cashed unauthorized ATP cards with Rosado and Rivera at Mr. Diaz' check-cashing establishment located at 158th Street (T-147, 154, 427).

It is respectfully submitted that the evidence was insufficient for a jury to reasonably draw the inference of intent urged by the government.

In Direct Sales v. United States, 319 U.S. 703 (1943), a leading case which focused on when one had the necessary requisite "intent" to become a member of a conspiracy, appellants were convicted of conspiring to violate the Federal Narcotics Law. Id. In Direct Sales, the corporate defendant solicited the business of one Dr. Tate, who ordered a large quantity of

morphine sulphate tablets from Direct Sales. Id. at 704. The government established at trial that Dr. Tate had illegally distributed morphine, when he was purchasing morphine from the defendant. Id. at 707. The government further brought out that it had "warned" officers employed by Direct Sales during this period that the morphine was being used as a source of supply by convicted physicians. Id. at 707.

The present case can clearly be distinguished from Direct Sales, supra, because the defendant did not solicit ATP cards from others. On the contrary, he was employed as a cashier or conduit who cashed ATP cards in the ordinary course of business of his employment. Rosado, the government's key witness, referred to him as a "worker" (T-329). In addition, as distinguished from Direct Sales, the government had never "warned" Mr. Perez that Rosado or Rivera were cashing unauthorized ATP cards at other stores, despite the fact that the government had known that Rosado had been cashing excessive food coupon redemptions previously (T-598). In fact, on cross-examination, agent Allen stated that he knew Rosado's redemptions were excessive, because he "had observed two hundred thousand a month or something like that" (T-599).

In the present case, the government was unable to produce evidence which would have established that Mr. Perez had any knowledge of Rosado's, Rivera's and Diaz' illegal food stamp sales. Rosado could not

recall anyone being present during his initial meeting with Diaz (T-1475). In addition, Rivera, an admitted conspirator, never informed Mr. Perez that the ATP cards were stolen (T-497), nor did Diaz, Perez' employer.

In United States v. Micciche, 525 F. 2d. 544 (8th Cir., 1975), the defendant was charged with conspiring to knowingly and fraudulently transfer and conceal assets in contemplation of a bankruptcy proceeding. Id. at 546. The evidence established that the defendant was a salesman employed in a furniture store. The court concluded that the defendant may have known about the illegal conspiracy, and in fact had aided the conspirators. Id. at 547. However, the court held that this did not establish the defendant's intent to become a member of the conspiracy because, as a worker in the store, he might have been aware of the conspiracy, but still not have become a party to it. Id.

In the instant case, the defendant was one step further removed from a conspiracy than the defendant in Micciche, supra, because Mr. Perez did not have knowledge of the stolen ATP cards. This was elicited in cross-examination when Rivera, one of the two individuals who purportedly received food stamp coupons at Mr. Diaz' store on 108th Street and Broadway, stated that he had never told the defendant the ATP cards were stolen (T-497).

It is respectfully submitted that the government's "inference" did not establish that the defendant possessed the requisite element of intent necessary to convict him of the crime of conspiracy.

In United States v. Gallishaw, 428 F. 2d 760, 763 (2nd Cir., 1970), in a case charging the defendant with conspiring to violate 18 U.S.C. §371, the Court quoted the language of the Supreme Court:

" Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself." Ingram v. United States, 360 U.S. 672, 678 (1959); United States v. Schwartz, 464 F. 2d. 499 (2nd Cir., 1972); United States v. Hysohion, 448 F. 2d. 343 (2nd Cir., 1971).

In the instant case, the conspiracy count of the indictment, Count 1 (App.3a-23a), cited 18 U.S.C. §1001. In United States v. Glantzman, 447 F. 2d. 199, 201 (3rd Cir., 1971), Glantzman, who owned an employment agency, was convicted of violating 18 U.S.C. §1001. However, on appeal the appellate court reversed the conviction, reasoning that:

" Although the correspondence to and from the state employment service indicates that he had personal knowledge of the processing of Newman's and Quamina's applications, it was incumbent upon the government to prove that Glantzman also knew of the applicants' lack of qualifications for the orderly positions. Those facts were not apparent on the face of the final forms. Absent such proof it is as plausible to conclude that Glantzman believed the applicants did possess qualifications for the hospital orderly positions as it is to charge him with knowledge of the fraudulent circumstances. At best, all the government proved was that Glantzman knew, or should have known, of prior applications for uncertified positions.

" We hold that the government failed to meet its burden of establishing the elements of the crime by proof beyond a reasonable doubt. The judgment of conviction against Glantzman will not be permitted to stand." Id. at 201, 202.

In the present case, at best all the government proved was that Perez was the individual clerk working in the 158th Street check-cashing establishment. The government desires that one draw inferences of knowledge without substantiating the said knowledge with creditable evidence.

CONCLUSION

FOR ALL THE AFOREMENTIONED REASONS, IT IS
RESPECTFULLY SUBMITTED THAT THE CONVICTION OF THE DEFENDANT PEREZ SHOULD
BE REVERSED, AND THE INDICTMENT DISMISSED OR, IN THE ALTERNATIVE, A NEW
TRIAL GRANTED.

RESPECTFULLY SUBMITTED,



STUART R. SHAW
Attorney for Defendant-Appellant PEREZ
600 Madison Avenue
New York, New York 10022
212/755-5645

COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -

LUIS PEREZ a/k/a HEKTOR PEREZ,
Defendant-Appellant.

From a Judgment of Conviction of the U.S. District
Court for the Southern Dist. of N.Y.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, Reuben A. Shearer, being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 211 West 144th Street, New York, New York 10030.

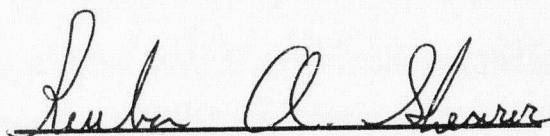
That on the 23 day of June, 19 77 at One St. Andrews Plaza
New York, N.Y.

deponent served the annexed *Bring*

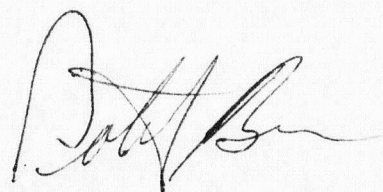
upon
U.S. Attorney-Southern Dist.
Robert Fiske, Jr.

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 23
day of June, 19 77



Reuben A. Shearer



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979